Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1976.

76-281

HUB THEATRES, INC., ASPEN REALTY, INC., SUFFOLK CONCESSIONS, INC.,
APPELLANTS,

v.

MASSACHUSETTS PORT AUTHORITY,
APPELLEES.

APPEAL FROM FINAL JUDGMENT OF THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Jurisdictional Statement.

LOUIS WINER,
WINER, ABRAMS, SHUMAN
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73 Tremont Street,
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(617) 723-6150

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

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Supreme Court Rules 13(2) and 15 1

Supreme Court of the United States.

OCTOBER TERM, 1976.

HUB THEATRES, INC., ASPEN REALTY, INC., SUFFOLK CONCESSIONS, INC.,
APPELLANTS,

v.

MASSACHUSETTS PORT AUTHORITY,
APPELLEES.

APPEAL FROM FINAL JUDGMENT OF THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Jurisdictional Statement.

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, the appellants, Hub Theatres, Inc., Aspen Realty, Inc. and Suffolk Concessions, Inc., file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment entered by the Massachusetts Supreme Judicial Court in this case and should exercise such jurisdiction herein.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court is reported in Mass. Adv. Sh. (1976) 1031 (346 N.E. 2d 371) and is appended hereto.

Grounds of Jurisdiction of Supreme Court.

This appeal arises from an action in tort against the Massachusetts Port Authority for damages arising out of a nuisance created by the Port Authority in its operation, maintenance and control of General Edward Lawrence Logan International Airport. The judgment of the Massachusetts Supreme Judicial Court denying relief to appellants was entered on April 16, 1976. The appellants herein filed an application for rehearing in the Massachusetts Supreme Judicial Court on April 28, 1976, which was denied by the Court on May 28, 1976. A timely notice of appeal was filed on August 18, 1976, in the Massachusetts Supreme Judicial Court. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(2).

Cases which sustain the jurisdiction of this Court include: *Commonwealth Bank of Kentucky* v. *Griffith,* 14 Pet. 56 (39 U.S. 343), 10 L. Ed. 352 (1840); *Walker* v. *Taylor,* 5 How. 64 (46 U.S. 302), 12 L. Ed. 52 (1847); *New York, New Haven and Hartford Railroad Company* v. *New York,* 165 U.S. 628, 41 L. Ed. 853 (1897); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 43 L. Ed. 2d 482 (1975).

The statute of the Commonwealth of Massachusetts, the validity of which is involved in this appeal, is c. 465 of the Acts of 1956, codified as M.G.L. c. 91 App., §§ 1-29, the pertinent sections of which are appended hereto.

Questions Presented.

1. Whether c. 465 of the Acts of 1956 (M.G.L. c. 91 App., §§ 1-29) is valid insofar as it purports to grant to the Massachusetts Port Authority legislative sanction to conduct its operations in such a manner as to cause substantial damages to others, without paying just compensation therefor.

2. Whether c. 465 of the Acts of 1956 (M.G.L. c. 91 App., §§ 1-29), as interpreted by the Massachusetts Supreme Judicial Court to preclude appellants' action to recover damages for a tortious interference with their business, is repugnant to the Fourteenth Amendment to the United States Constitution.

Statement of the Case.

In 1955, the appellant Aspen Realty, Inc. built a drive-in theatre on land owned by it near Logan Airport. The theatre was leased to appellant, Hub Theatres, Inc., which operated the theatre. The appellant Suffolk Concessions, Inc. operated the refreshment facilities at the theatre. The theatre at the time of its construction was located approximately one-half mile from Logan Airport.

When the theatre was constructed, aircraft using the airport were operated by piston engines. These aircraft were much smaller in size and operated much more quietly than the large jet aircraft currently in use. Piston engine aircraft were easily maneuverable, and a pilot could avoid passing over the theatre area at will. For the first several years after construction, the appellants operated their respective businesses successfully, and piston-operated aircraft did not interfere with the theatre operation. In the latter part of the 1950's, and after the con-

struction of the theatre, a new runway was installed at the airport with a glide path directly over the theatre. The first aircraft to use the new runway were prop jets which were somewhat larger and noisier than the piston engines. However, the appellants were able to operate notwithstanding some inconvenience of some noise of the prop jets. From time to time, additional runways were constructed at the airport with designated glide paths which would be used by aircraft arriving and departing the airport.

During the 1960's and early 1970's, larger aircraft which were fully jet-operated began using Logan Airport. The records of the appellants will show that as jet aircraft traffic increased, the business of the appellants declined. Many of the jet aircraft using glide paths over the drive-in theatre were below safe navigable air space and emitted noxious fumes and ear-splitting noises with tremendous vibrations. With the continual increase in size of jet aircraft and the increase in volume of traffic, the exhibition of motion pictures at said theatre was no longer feasible, and on October 1, 1972, the appellant Hub Theatres, Inc. was obliged to shut down the operations of the theatre.

The appellee Massachusetts Port Authority took title and possession of the airport pursuant to the provisions of c. 465 of the Acts of 1956. The appellants brought this action against the Massachusetts Port Authority grounded on the claim of nuisance. The appellants' declaration (now complaint) which is based on nuisance, sets out in detail the facts constituting the alleged nuisance.

The appellee filed a demurrer (now motion to dismiss) which demurrer was sustained by the justice of the Superior Court on the grounds that the acts complained of, although causing substantial damages to third parties

without the payment of just compensation, were sanctioned by the legislature.

The appellants sought review of the Superior Court's decision in the Massachusetts Appeals Court. However, the Massachusetts Supreme Judicial Court, on its own initiative, took jurisdiction of the case and ordered direct appellate review.

The issue in this case from the very outset has been whether or not the state has the power to legislatively sanction the Massachusetts Port Authority to conduct activities which, although short of a constructive taking, create a substantial nuisance resulting in serious damages to innocent parties without the payment of just compensation in its brief, the appellee Massachusetts Port Authority relies on the Federal Aviation Act of 1958, Pub. L. no. 85-726, 72 Stat. 731, 49 U.S.C. §§ 1301 et seq., taking the position that:

> "the application of Massachusetts nuisance law to Logan Airport is directly precluded by the operation of Federal law."

The Massachusetts Supreme Judicial Court concluded in its opinion that the appellants' declaration (now complaint) must fail because it does not allege facts which amount to a constructive taking which would entitle the appellants to damages pursuant to Amendments V and XIV to the United States Constitution. *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962); *United States* v. *Causby,* 328 U.S. 256 (1946).

Substantiality of Federal Questions.

The appellee has advanced the proposition that there are no equities to consider in a matter of this nature, be-

cause the question of airport nuisance has already been answered by state law which grants the Massachusetts Port Authority absolute legislative immunity. The appellee goes even further and states in its brief that it is not even necessary to apply Massachusetts nuisance law because the issue of damages without just compensation is directly precluded by federal law. The appellee cites *Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 638 (1973); *Bensenville* v. *Chicago*, 16 Ill. App. 3d 733, 738 (1973); and *Luedtke* v. *County of Milwaukee*, 371 F. Supp. 1040, 1043 (E.D. Wis. 1974) in support of this proposition and goes on to conclude that the federal law alone is dispositive of the issue.

The appellants submit that the Commonwealth does not have power to grant absolute immunity to itself or its political subdivisions for tortious interference with the lives and property of its citizens without just compensation. The appellants do not dispute the power of the Commonwealth to grant limited immunity to itself and its political subdivisions against tort actions, such a grant being a practical necessity if the Commonwealth is to carry out essential governmental functions. This immunity must have limitations, however, if the abridgement of the rights of individual citizens is to be avoided. Blanket immunity such as is urged by the appellee would give the Commonwealth the untrammeled ability to effectively foreclose the appellants' right to compensatory damages pursuant to the Fourteenth Amendment to the United States Constitution.

Conclusion.

This case involves critical questions regarding the extent to which a state may constitutionally authorize and carry on activities, short of a constructive taking, which cause substantial injury to private property without affording a right of redress for such injury.

Respectfully submitted,

LOUIS WINER,
WINER, ABRAMS, SHUMAN
& HERSHFANG,
73 Tremont Street,
Boston, Massachusetts 02108.
(617) 723-6150

APPENDIX.

Opinion Below.

Certified Copy of the Opinion
of the
Supreme Judicial Court
Commonwealth of Massachusetts.
Boston, July 30, 1976

I certify *the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Hub Theatres, Inc. & others vs. Massachusetts Port Authority decided on the 16th day of April, 1976.*

/s/ Thomas B. Merritt
Reporter of Decisions.

S-262 S.J.C.

HUB THEATRES, INC. & others [1] *vs.*
MASSACHUSETTS PORT AUTHORITY.

Suffolk. October 8, 1975.–April 16, 1976.

Present: Reardon, Quirico, Braucher, & Wilkins, JJ.

Practice, Civil, Motion to dismiss. *Massachusetts Port Authority. Nuisance. Airport.*

Tort. Writ in the Superior Court dated February 19, 1974. The action was heard by *Lynch*, J., on a motion to dismiss. After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Bart J. Vinik (*Louis Winer with him*) for the plaintiffs.

George C. Caner, Jr. (*John Silas Hopkins, III*, with him) for the defendant.

Quirico, J. This action in tort was commenced in the Superior Court against the Massachusetts Port Authority

[1] Aspen Realty, Inc., and Suffolk Concessions, Inc.

(Authority) for damages allegedly arising out of a nuisance created by the Authority in its operation, maintenance and control of General Edward Lawrence Logan International Airport (Logan). The plaintiffs are Aspen Realty, Inc. (Aspen), Hub Theatres, Inc. (Hub) and Suffolk Concessions, Inc. (Suffolk). The case is before us on the plaintiffs' appeal from the judgment entered after the allowance of the Authority's motion to dismiss.[2] See Mass. R. Civ. P. 12 (b), 365 Mass. (1974). We affirm.

For purposes of this motion to dismiss, we take all of the allegations of fact contained in the plaintiffs' complaint to be true. *Jones* v. *Brockton Pub. Mkts. Inc.,* Mass. , – (1975).[3] We summarize those allegations. In 1955, Aspen constructed a drive-in theatre on land which it owned in the East Boston district of Boston. At the time of its construction the theatre was located approximately 2,500 feet away from Logan. Aspen leased the land and the theatre thereon to Hub which undertook to operate the theatre. Hub in turn subleased the food concession in the theatre to Suffolk.

In 1959, the Authority assumed responsibility for the operation, maintenance and control of Logan and began to expand operations of the airport. It is alleged that as a result of this expansion many airplanes were caused to fly over the theatre at very low heights and to emit such fumes and noise and set up such vibrations as to create a total interference with the plaintiffs' theatre operations.

[2] The present case was commenced by the plaintiffs' filing a "Declaration" on May 6, 1974. The Authority filed a "Demurrer" to the declaration on May 28, 1974. The new Massachusetts Rules of Civil Procedure, 365 Mass. (1974), took effect on July 1, 1974. We treat the case (as did the judge of the Superior Court) as though it had been commenced under the new rules, and we refer to, and so consider, the "Declaration" as a "complaint" and the "Demurrer" as a "motion to dismiss."

[3] Mass. Adv. Sh. (1975) 3714, 3714-3715.

For these reasons the plaintiffs allege that they were forced to discontinue their operations on October 1, 1972.

The Authority moved to dismiss the plaintiffs' complaint on the grounds (1) that the complaint "does not set forth substantive facts constituting a cause of action"; (2) that the complaint "is insufficient in law"; and (3) that "Chapter 465 of the Acts of 1956 . . . precludes recovery by the plaintiffs in this action of tort." For the reasons which follow, we agree with the action taken by the Superior Court judge in allowing the Authority's motion to dismiss based on the third ground set forth in support thereof.

Statute 1956, c. 465, provides in part in § 2 thereof: "There is hereby created . . . a body politic and corporate to be known as the Massachusetts Port Authority . . . . The Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function." Under § 5, the Authority is vested with title to, and the control, operation and maintenance of certain airport properties, including Logan (§ 1 [b]), and it further is authorized and empowered "[t]o extend, enlarge, improve, . . . maintain, . . . and operate the projects under its control . . ." (§ 3 [g]).

The operation and extension or enlargement of Logan by the Authority, the very activity of which the plaintiffs complain, being expressly authorized by the Legislature, the plaintiffs' action predicated on a nuisance theory must fail. It is a principle of long standing in the law of the Commonwealth that "when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law."

Sawyer v. *Davis*, 136 Mass. 239, 241-242 (1884), and cases cited. *Saltonstall* v. *New York Cent. R.R.*, 237 Mass. 391, 393-399 (1921). See *Czapski* v. *Sun Oil Co.*, 303 Mass. 186 (1939); *Strachan* v. *Beacon Oil Co.*, 251 Mass. 479, 487 (1925). In *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, 523 (1930), involving claims of trespass and nuisance arising out of the operation of an airport, we said: "There are numerous analogies where the invasion of the airspace over underlying land by noise, smoke, vibration, dust and disagreeable odors, having been authorized by the legislative department of government and not being in effect a condemnation of the property although in some measure depreciating its market value, must be borne by the landowner without compensation or remedy. *Legislative sanction makes that lawful which otherwise might be a nuisance*" (emphasis supplied).

The manner in which a business or activity which has been legislatively sanctioned may be conducted, however, is not without limitations. Rather, it is "subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others." *Sawyer* v. *Davis*, *supra* at 242. The plaintiffs have not alleged that the Authority has been negligent in its activities at Logan or that such activities have been unreasonable or unnecessary. On the allegations contained in the plaintiffs' complaint, the plaintiffs' action in tort for nuisance was properly dismissed.

While the result which we reach may have the effect of precluding the plaintiffs Hub and Suffolk from recovery in this situation, we note, as did the judge of the Superior Court, that it does not necessarily leave the plaintiff Aspen, the owner of the real estate on which the theatre business was operated, without a remedy. If the activity complained of in fact and law amounts to a taking or condemnation of property by the Authority, the owner of the property

so affected may be entitled to just or reasonable compensation therefor, but we do not have that question before us. Art. 10 of the Declaration of Rights of the Constitution of Massachusetts. U.S. Const. amends. V, XIV. *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). *United States* v. *Causby*, 328 U.S. 256 (1946). In this Commonwealth, the Legislature has provided by statute (G.L. c. 79) for the assessment of damages arising out of a taking of property. *Saltonstall* v. *New York Cent. R.R.*, 237 Mass. 391, 397-399 (1921). The plaintiff Aspen has not alleged a taking and this is not a petition for the assessment of damages under G. L. c. 79. It has chosen instead to proceed by an action in tort for nuisance which cannot be sustained on the allegations of its complaint.[3]

The judgment entered in the Superior Court is affirmed.

So ordered.

[3] In this regard, it has been represented to us by the parties that Aspen has in fact filed a separate petition, presently pending in the Superior Court, which alleges a "constructive taking" of its property. We merely take note of this fact, it having formed no part of the basis of our decision.

Request for Rehearing Denied.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
COURT HOUSE
BOSTON

FREDERICK J. QUINLAN
CLERK
WILLIAM M. CLORAN
ASSISTANT CLERK

May 28, 1976

Louis Winer, Esquire
Winer, Abrams, Shuman & Hershfang
Suite 200 Tremont Building
73 Tremont Street
Boston, Massachusetts 02108

Dear Mr. Winer:

Your request for rehearing in re the above-captioned case has been considered by the Court and is denied.

Very truly yours,
/s/ William M. Cloran
William M. Cloran
Assistant Clerk

WMC: lhw
cc: George C. Caner, Jr., Esquire
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
6-9-76—SMC
JM
BV
Owen Todd

Judgment after Rescript.

A TRUE COPY OF JUDGMENT DULY ENTERED ON JUNE 3, 1976
N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET JUNE 3, 1976
PURSUANT TO MASS. R. CIV. P. 58(b) AND NOTICE SENT TO PARTIES PURSUANT TO MASS. R. CIV. P. 77(d) AS FOLLOWS:

Commonwealth of Massachusetts
SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 684362

HUB THEATRES, INC., AND OTHERS, Plaintiff(s)
v.
MASSACHUSETTS PORT AUTHORITY, Defendant(s)

JUDGMENT FOR DEFENDANT AFTER RESCRIPT
(PURSUANT TO MASS. R.A.P. 28)

This action was appealed to the Supreme Judicial Court—the issues having been duly heard and the Supreme Judicial Court having duly issued a rescript, it is ordered and adjudged: the complaint of plaintiffs is dismissed. Judgment for defendant without costs.

Dated at Boston, Massachusetts, this 3rd day of June, 1976.

THOMAS DORGAN, Clerk
By: /s/ John E. Powers, Asst. Clerk

NOTICE TO PARTIES: PURSUANT TO MASS. R.A.P. 26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUDGMENT.

Notice of Appeal.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
NO. 262

HUB THEATRES, INC.
ASPEN REALTY, INC.
SUFFOLK CONCESSIONS, INC.
VS.
MASSACHUSETTS PORT AUTHORITY

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY HUB THEATRES, INC., ASPEN REALTY, INC. AND SUFFOLK CONCESSIONS, INC.

Notice is hereby given that Hub Theatres, Inc., Aspen Realty, Inc. and Suffolk Concessions, Inc. hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on May 28, 1976, denying Hub Theatres, Inc., Aspen Realty, Inc. and Suffolk Concessions, Inc.'s application for re-hearing. This appeal is taken pursuant to 28 U.S.C. S. 1257(2).

By its attorneys,
/s/ Louis Winer
Louis Winer, Esq.
Winer, Abrams, Shuman & Hershfang
73 Tremont Street
Boston, Massachusetts 02108
723-6150

Certificate of Service

I, Louis Winer, a member of the bar of the Supreme Judicial Court of Massachusetts and a member of the bar of the Supreme Court of the United States, hereby certify that on August 18, 1976, in accordance with Rule 33(3)(b) of the Rules of the Supreme Court of the United States, I served all parties required to be served with Appellants' Notice of Appeal by mailing, postage prepaid, a copy thereof to Co-Counsel for Appellee, George C. Caner, Jr.,

Esq., Ropes & Gray, 225 Franklin Street, Boston, Massachusetts 02110, and to Co-Counsel for Appellee, Neil L. Lynch, Massachusetts Port Authority, 99 High Street, Boston, Massachusetts 02110.

/s/ Louis Winer
Louis Winer

I, Louis Winer, a member of the bar of the Supreme Judicial Court of Massachusetts and a member of the bar of the Supreme Court of the United States, hereby certify that I filed the within Notice of Appeal with the Clerk of the Massachusetts Supreme Judicial Court on August 18, 1976.

/s/ Louis Winer
Louis Winer

Relevant Statutes.

MASSACHUSETTS GENERAL LAWS.

G.L. c. 91 (Appendix).

§ 1-2. [Authority created; status; membership; terms of office, etc.]

There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Authority, which shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function.

The Authority shall consist of seven members all of whom shall be appointed by the governor by and with the advice and consent of the council, and shall be residents of the commonwealth. Not more than four of such members shall be of the same political party, and shall include persons with extensive experience in the fields of engineering, finance and commerce, and shall include a bona fide representative of a national or international labor organization, free of communist influence or domination which organization shall have the nature of its interests and employment directly and continually related to the scope of the activity of the Authority. The members of the Authority first appointed shall continue in office for terms expiring on June thirtieth, nineteen hundred and sixty, June thirtieth, nineteen hundred and sixty-one, June thirtieth, ninteeen hundred and sixty-two, June thirtieth, nineteen hundred and sixty-three, June thirtieth, nineteen hundred and sixty-four, June thirtieth, nineteen hundred and sixty-five, and June thirtieth, nineteen hundred and sixty-six, respectively, the term of each such member to be designated by the governor and to continue until his successor shall be duly appointed and qualified. The successor of each such member shall be appointed for a term of seven years and until his successor shall be duly appointed and qualified, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any member of the Authority shall be eligible for reappointment. Each member of the Authority may be removed by the governor, with the advice and consent of the council, for misfeasance, malfeasance or willful neglect of duty but only after reasonable notice and a public hearing unless the same are in writing expressly waived. Each member of the Authority before entering upon his duties shall take an oath before the governor to administer the duties of his office faithfully and impartially, and a record of such oaths shall be filed in the office of the secretary of the commonwealth.

The governor shall designate one of the members as chairman of the Authority who shall serve as such chairman during his term of office as a member. Upon the expiration of the term of office of any such chairman, the governor shall designate one of the members as chairman, who shall serve as such chairman during his term or the remainder of his term of office as a member. The Authority shall annually elect one of its members as vice-chairman and shall also elect a secretary-treasurer who need not be a member of the Authority.

The secretary-treasurer shall keep a record of the proceedings of the Authority and shall be custodian of all books, documents and papers filed with the Authority and of the minute book or journal of the Authority and of its official seal. He shall have authority to cause copies to be made of all minutes and other records and documents of the Authority and to give certificates under the official seal of the Authority to the effect that such copies are true copies, and all persons dealing with the Authority may rely upon such certificates.

Four members of the Authority shall constitute a quorum and the affirmative vote of four members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the Authority.

Before the issuance of any revenue bonds under the provisions of this act the secretary-treasurer of the Authority shall execute a surety bond in the penal sum of one hundred thousand dollars, such surety bond to be conditioned upon the faithful performance of the duties of his office, to be executed by a surety company authorized to transact business in the commonwealth as surety and to be approved by the attorney general and filed in the office of the secretary of the commonwealth.

The members of the Authority shall serve without compensation, but each member shall be reimbursed for all necessary travel and other expenses incurred by him in the discharge of his official duties.

[St. 1956, c. 465, § 2.]

§ 1-3. [General grant of powers.]

The Authority is hereby authorized and empowered—

(*a*) To adopt by-laws for the regulation of its affairs and the conduct of its business, and to fix penalties for the violation thereof; provided, however, that no penalty shall be in excess of two thousand dollars.

(*b*) To adopt an official seal and alter the same at pleasure;

(*c*) To maintain offices at such place or places, either within or without the commonwealth, as it may determine;

(*d*) To sue and be sued in its own name, plead and be impleaded;

(*e*) To construct or acquire additional facilities;

(*f*) Except as provided in chapter three hundred and fifty-four of the acts of nineteen hundred and fifty-two, as amended from time to time, to investigate the necessity for additional facilities for the development and improvement of commerce in the city and in the metropolitan area surrounding the city and for the more expeditious handling of such commerce. including but not limited to, additional traffic facilities, bus and truck terminals, off-street parking facilities, and facilities for the handling, storage, loading or unloading of freight or passengers at steamship, railroad or motor terminals or airports, and to make such studies, surveys and estimates as may be necessary to determine the feasibility of any such facility; and further to investigate the operations, financing and traffic of the Metropolitan Transit Authority, to make such studies, surveys and estimates as may be necessary in addition to or in connection with those made by other public or private agencies to determine the feasibility of acquiring the properties of said authority as a facility of the Authority, and to report thereon to the governor and general court not later than two years from the effective date of this act:

(*g*) To extend, enlarge, improve, rehabilitate, lease as lessor or as lessee, maintain, repair and operate the projects under its control, and to establish rules and regulations for the use of any such project; provided, however, that no such rules or regulations shall conflict with the rules and regulations of any state or federal regulatory body having jurisdiction over the operation of aircraft; and provided, further, that in the enforcement of such rules and regulations the police appointed or employed by the Authority under section twenty-three shall have within the boundaries of all projects all the powers of police officers and constables of the towns of the commonwealth except the power of serving and executing civil process;

(*h*) To issue its revenue bonds, payable solely from revenues, and in anticipation of an issue of its revenue bonds to borrow money, all as hereinafter provided;

(*i*) To fix and revise from time to time and charge and collect tolls, rates, fees, rentals and other charges for the use of any project under its control; provided, however, that in revising or fixing the tolls for the use of the Mystic River bridge, the Authority shall give at least ten days' notice of the new schedule of tolls by publishing at least once in a daily newspaper of general circulation in the city; and provided, further, that no toll or charge for the use of any highway, bridge or tunnel of the Authority shall be collected for the passage of vehicles of the Metropolitan Transit Authority;

(*j*) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(*k*) To acquire in its own name by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws or any other alternative method now or hereafter provided by law, in so far as such provisions may be applicable, such public or private lands, or parts thereof or rights therein, and public or private ways as it may deem necessary for carrying out the provisions of this act; provided, that the Authority shall act in its name and on its behalf in excercising its functions under this clause; and, provided, further, that before taking any private property the Authority shall give security to the treasurer, in such amount and in such form as may be determined by the department of public works, for the payment of such damages as may be awarded in accordance with law for such taking, and that the provisions of section forty of said chapter seventy-nine, in so far as the same may be applicable, shall govern the rights of the Authority and of any person whose property is so taken;

(*l*) To employ consulting engineers, accountants, attorneys, construction, financial and other experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation; provided, that all such expenses shall be payable solely from funds provided under the authority of this act;

(*m*) To appear in its own behalf before boards, commissions, departments or other agencies of the federal government and other states and international conferences and before committees of the congress of the United States and the general court of the commonwealth in all matters relating to its powers and purposes;

(*n*) To make application for, receive and accept from any federal agency grants for or in aid of the planning, construction or financing of any project or any additional

facility, and to receive and accept contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made;

(*o*) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act;

(*p*) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

[St. 1956, c. 465, § 3. Amended by St. 1958, c. 599, § 2; St. 1967, c. 869, § 5; St. 1968, c. 449, § 1.]

(*q*) To apply for, establish, operate, and maintain or lease to others to operate and maintain, subject to the approval of the local municipality, a foreign trade zone and sub-zones in the commonwealth in accordance with the Foreign Trade Zones Act of 1934 (Title 19 U.S.C. Sections 81a-81u). Land acquired by the Authority after the effective date of this act which was subject to taxation on the assessment date next preceding the acquisition thereof and used by the Authority for a foreign trade zone shall not be exempt from local real estate taxes, and any such land leased by the Authority to others for said purpose shall be taxed by the city or town in which the land is situated to the lessees thereof in the same manner as if they were the owners.

(*r*) To make such studies, surveys and estimates as may be necessary in addition to or in connection with those made by other public or private agencies to determine the feasibility of acquiring necessary facilities and vessels to be operated by existing private marine carriers of passengers for hire, with or without such federal and or other aids as may be available, and to take whatever action necessary to implement such passenger carrier service.

[Amended by St. 1971, c. 771; St. 1972, c. 198; St. 1974, c. 208.]

§ 1-4. [Acquisition of property.]

The Authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, any land, property, rights of way, franchises, easements and other interests in lands as it may deem necessary or convenient for the construction or for the operation of any project, upon such terms and at such price as may be considered by it to be reasonable and can be agreed upon between the Authority and the owner thereof, and to take title thereto in the name of the Authority.

The Authority may, for the purposes of this act, acquire in its own name by purchase or otherwise, or may take by eminent domain under chapter seventy-nine of the General Laws or any other alternative method now or hereafter provided by law, lands in fee including buildings thereon, and easements, estates and rights in land, including the right to go under the surface thereof, or through or under buildings or parts of buildings thereon, or any leasehold rights, or other rights therein, or relative thereto; such takings in fee or otherwise may be made, whether the lands or other rights taken or otherwise affected are held under or by title derived by eminent domain or otherwise, and the Authority may, for such purposes, acquire in its own name by purchase or otherwise, or may take any property and rights of any kind deemed by it essential for the construction or for the operation of any project. A taking or purchase under this section of an easement or other estate air right or other right in a particular parcel of real estate, or any right taken, whether such parcel or other right taken consists of unimproved land or of land and buildings or rights of any nature, may be confined to a portion or section of such parcel or right fixed by planes of division,

or otherwise, below or above or at the surface of the soil, and in such case no taking need be made of upper or lower portions, or other parts or section thereof, except of such easements therein, if any, as the Authority may deem necessary. The Authority shall, so far as may be practicable, notify all known owners of such taking, but the validity thereof shall not be affected by want of such notice.

The Authority may sell the buildings or other structures upon any lands taken by it, or may remove the same, and may sell, if a sale be practicable, or if not, may lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purpose. The proceeds of any such sale or lease shall be applied toward the cost of the project or deposited to the credit of the sinking fund for the revenue bonds issued under the provisions of this act; provided, however, that no airport or port properties acquired from the commonwealth under the provisions of this act shall be sold without the prior approval of the governor and council; and provided, further, that the proceeds of any such sale shall be paid to the treasurer and shall be credited as provided in paragraph (*a*) of section seven.

The Authority may order the removal or relocation of any surface tracks, and the removal or relocation of any conduits, pipes, wires, poles or other property located in public ways or places, or in or upon private lands, which it deems to interfere with the laying out, construction or operation of any project, and the proper authorities shall grant new locations for any such structure so removed or relocated, and the owner thereof shall be reimbursed by the Authority for the reasonable cost of such removal or relocation. Such orders, to the extent specified therein, shall be deemed a revocation of the right or license to main-

tain such tracks, pipes, conduits, wires, poles or other property in such public ways or places, and the private owner of any such structures in public ways or lands shall comply with such orders. If any such owner shall fail to comply with any such order of the Authority relating to any such structure in public ways and places within a reasonable time, to be fixed in the order, the Authority may discontinue and remove such tracks, conduits, pipes, wires, poles or other property, and may relocate the same, and the cost of such discontinuance, removal or relocation shall be repaid to the Authority by the owner. No such discontinuance, removal or relocation shall entitle the owner of the property thus affected to any damages on account thereof, except for the reimbursement of cost provided for above. Any such structure in or upon private lands may be removed and relocated by the Authority, or, if removed and relocated by the owner thereof, the reasonable expense shall be repaid to him by the Authority. This section shall not apply to facilities on property of the commonwealth under the control of the department of public works or the metropolitan district commission or installed under licenses or permits granted by said department or commission, except with its approval.

The Authority and its authorized agents and employees may enter upon any lands, water and premises in the commonwealth for the purpose of making surveys, soundings, drillings and examinations as it may deem necessary or convenient for the purposes of this act, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending. The Authority shall make reimbursement for any actual damages resulting to such lands, waters and premises as a result of such activities.

The commonwealth hereby consents to the use of all lands owned by it, including lands lying under water, which are

deemed by the Authority to be necessary for the construction or operation of any project; provided, however, that any such use shall require the prior approval of the governor and council, except as otherwise specifically provided for in this act.

[St. 1956, c. 465, § 4. Amended by St. 1958, c. 599, § 3; St. 1967, c. 869, § 6.]

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In The
Supreme Court Of The United States

OCTOBER TERM, 1976

No. 76-281

HUB THEATRES, INC., ASPEN REALTY, INC.,
SUFFOLK CONCESSIONS, INC.,
Appellants

v.

MASSACHUSETTS PORT AUTHORITY,
Appellee

On Appeal from the Supreme Judicial Court of Massachusetts

MOTION TO DISMISS

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PRESS OF GEORGE H. DEAN CO., BOSTON

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The appellee Massachusetts Port Authority moves to dismiss the appeal on the grounds that the Court lacks jurisdiction under 28 U.S.C. § 1257(2), the statute invoked by the appellants (Jur. St. 2), that the appeal does not present a substantial federal question, that the purported federal question presented was not timely or properly raised, that the judgment below rests on an adequate non-federal basis, and that the appeal does not comply with the rules of this Court, particularly Rule 15(1)(d).

The Supreme Judicial Court of Massachusetts affirmed the dismissal of the action on the pleadings by the Massa-

chusetts Superior Court. The plaintiffs had commenced an action in tort against the Massachusetts Port Authority, created by an Enabling Act (Chapter 465 of the Massachusetts Acts of 1956) which directed it, as successor to the state, to maintain and operate Logan Airport, on the ground that flights over the plaintiffs' theatre were the responsibility of the Authority, constituted a nuisance,[1] and entitled the plaintiffs to recover three million dollars from the defendant. The Authority demurred to the writ and declaration and set up the bar of its Enabling Act. R. 4

The appellants say that "[t]he issue in the case from the very outset has been whether or not the state has the power to legislatively sanction . . . a substantial nuisance . . . without the payment of just compensation". Jur. St. 5. The truth of the matter is that they never pitched their damage claim on the Fourteenth Amendment or any other provision of federal law until such a position became a prerequisite of further judicial review. The plaintiffs' declaration (R.1-3) does not rely upon any constitutional provision. The decision of the Superior Court dismissing the

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[1] The opening sentences in the plaintiffs' Supreme Judicial Court (SJC) brief were as follows:

> "It may be properly inferred that the facts set forth in the Plaintiffs' Declaration wherein it is alleged that jet aircraft operating below safe navigable air space over an outdoor theatre, emitting noxious fumes and ear-splitting noise with attendant tremendous vibrations and other undesirable operations, would totally interfere with the exhibition and enjoyment of motion pictures by patrons of said outdoor theatre. Such conduct if proven by the Appellants, would certainly warrant the finding of a nuisance."

The appellee has requested that the clerk of the Supreme Judicial Court forward to this Court the record of the proceedings below and the briefs of the parties. Citations are to those materials.

action on the "clear principle of Massachusetts law that what the Legislature has authorized or directed cannot be a nuisance or trespass" (R.7) does not refer to any issue of whether the federal constitution confers a right to compensation for an alleged "nuisance" of this kind, not amounting to a taking. The appellants' SJC briefs made no such contention, leading the Authority in its brief to observe without contradiction that "[t]he constitutionality of the comprehensive legislation embodying this judgment [that the airport is not a public nuisance but a public benefit] has at all times been affirmed by our courts and is not challenged in this suit." Def. Br. 7-8; compare the plaintiffs' reply brief which takes no exception to this statement. The opinion of the Supreme Judicial Court recognizes no such issue. See Jur. St. 9-13. The plaintiffs' Petition for Rehearing (letter to Hennessey, C. J. of April 28, 1976) makes no claim that the Enabling Act as construed violates the Fourteenth Amendment, but rather maintains that the declaration was sufficient as a matter of state law falling within the exception mentioned in the SJC opinion for unreasonable and unnecessary activities. Coincidentally, the appellants have discovered their Fourteenth Amendment argument just at the point when it is the only argument statutorily reviewable.

The passage in the Authority's SJC brief quoted in the appellants' jurisdictional statement argues the point that even if a nuisance claim might be recognized by state law for permitting noisy overflights, the area of airplane noise had been occupied by federal law, which would preclude a state claim. Def. SJC Br. 14-18. The Supreme Judicial Court never reached this argument. Instead, it rested its decision on the "adequate non-federal basis" that no cause of action for nuisance existed under state law.

The insubstantiality of the contention now made that "[b]lanket immunity such as is urged by the appellee would give the Commonwealth the untrammeled ability to effectively foreclose the appellants' right to compensatory damages pursuant to the Fourteenth Amendment" (Jur. St. 6) is shown by another circumstance. The Superior Court noted the plaintiffs' right to recover damages for an activity "so extreme that it amounts to a taking" and the pendency of the plaintiffs' eminent domain petition for assessment of damages then pending in that court. R.9, 8. The plaintiffs referred to this proceeding in their affidavit filed in the Supreme Judicial Court on behalf of the appellants dated September 30, 1975.[2] The Supreme Judicial Court agreed that the plaintiffs in a proper proceeding could try out the issue of whether the activity complained of amounted to a taking but noted that "we do not have that question before us". Jur. St. 13. Thus, there has never been any question of "blanket" immunity here; it has always been recognized that an interference so major as to amount to a taking is compensable in an eminent domain proceeding, and the appellants have belatedly sought to take advantage of this remedy.

The Fourteenth Amendment does not reach governmental activities not amounting to a taking. See *Transportation Co.* v. *Chicago,* 99 U.S. 635 (1878); *Town of East Haven* v. *Eastern Airlines, Inc.,* 331 F.Supp. 16, *supplemented,* 333 F.Supp. 338 (D. Conn. 1971), *aff'd,* 470 F.2d 148 (2d Cir. 1972). The appellants' declaration did not allege a taking,

[2] "The action previously instituted against the Appellee alleging a constructive taking of the theatre property by the Appellee (Suffolk Superior No. 623529; which case is referred to on page 4 of the lower court's "Memorandum of Decision on Motion to Dismiss") is still pending in the Superior Court." Pl. SJC Aff. 1.

and its writ was in tort. While the Fourteenth Amendment does underlie the appellants' eminent domain position, it is not brought into play by this action of tort. Compare *Crane* v. *Hahlo,* 258 U.S. 142, 147 (1922); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 610 (1974).

Finally, the absence of any legitimate argument for review available to these appellants is underlined by their resort to extra-record factual assertions which are quite untrue. Conduct of this sort is a tacit admission that if they were to confine themselves to the truth, they could not prevail. This is a case decided on the pleadings . The Court will not find any allegation that "[i]n the latter part of the 1950's, and after the construction of the theatre, a new runway was installed at the airport with a glide path directly over the theatre. The first aircraft to use the new runway were prop jets . . . ." Jur. St. 3-4; contrast R.1-3. Instead, one finds that the actual allegation is:

> "That the Defendant, Massachusetts Port Authority, maintained and presently maintains its runways of varying lengths. Several of these runways were and are aimed at and point directly to the said Suffolk Downs Drive-in Theatre, and the glide paths to said runways are directly over the theatre." R.2 (Declaration, Count 1).

The plaintiffs' allegation that the runways *"were* and are aimed at" the theatre is basically truthful and is accepted arguendo on demurrer. The assertion of a *"new* runway" installed *"after* the construction of the theatre" not only lacks foundation in the record, but is purely fictional. The truth of the matter is that although there is indeed an airport runway (4R-22L) which is "aimed at and point[s] directly to" the plaintiffs' theatre, it was constructed in the 1940's. From the time of its construction to date there has been no change in its length or direction. The plaintiff-

appellants in 1955 deliberately located and built their open-air theatre squarely in the approach path of this runway, then Logan's longest and principal runway. This was a year before the creation of the Authority. The plaintiffs' attempt to avoid their share of responsibility for the overflights by misstating the chronology of events is quite unconscionable.

For all of the above reasons, appellees' motion to dismiss should be granted.

Respectfully submitted,

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September 24, 1976